TATUNG ELECTRONIC (S) PTE. LTD.

v.

BINATONE INTERNATIONAL LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
FA CHUA J
M KARTHIGESU J
[CIVIL APPEAL NO. 116 OF 1988]
23 JULY 1991

CONTRACT: *Supply of television sets for import into UK - Implied and express terms - Certificate of origin - Failure of television sets to meet 45% rule of local content - Detention - Restoration charges paid for release of television sets - Knowledge of requirements to be imputed to appellant - Rate of interest.*

The respondent R was a company incorporated in the United Kingdom dealing in and distributing goods in the UK. The appellant T was a manufacturer of electronic goods in Singapore and was a subsidiary of its parent company in Taiwan. The parent company in Taiwan and R negotiated for the supply of portable 12" black and white television sets. In 1978 the UK Government introduced quota restrictions on the import of goods from Taiwan into the United Kingdom. R wanted more television sets than the parent company could supply under those restrictions so the parent company proposed that T as its subsidiary should supply some sets to R as well. R agreed and subsequently orders were made by way of telephone conversations between T and R and confirmed by way of sales confirmations issued by T.

It was an express term of the eventual agreement that the television sets supplied by T to R would be issued with a Certificate of Singapore Origin. It was a requirement under EEC regulations that television sets would only be treated as being of Singapore Origin if the increase in value they acquire in Singapore represented at least 45% of their ex-works invoice price (the 45% rule)

In 1980, the UK Customs & Excise detained 7,665 television sets sold by T to R as they failed the 45% test and were held to be of Taiwanese and not Singapore origin.

The television sets were subsequently released upon payment by R of a restoration charge of £95,000. R claimed the abovesaid charges from T and interest thereon as well as interest on the purchase price of the 7,665 sets on the ground that their loss of £95,000 was caused by T's breach of a term of the contract of sale of the 45% rule. The trial Judge granted judgment to R. Hence this appeal against that judgment.

T contends that although it was an express term of the contract that the television sets should be issued with a Singapore Certificate of Origin, there was no further express or implied term that the 45% rule should be complied with and further that it had no knowledge of the 45% rule until much later.

Held:

[1] Since the 45% rule would have been a material factor in an agreement concerned with the import of television sets into the UK, the knowledge of L, Taiwan agent's representative, was derived from the transactions he negotiated on behalf of T; therefore, T must be deemed to be affected with the knowledge of L on this point because it was a possible term which L had the power to bind T on or at least had a duty to inform T about, and so R should be permitted to assume that L's knowledge was passed on.

[2] It is difficult to accept that T, with its long experience in the business of exporting electronic goods, did not know of the 45% rule at the material time. The *raison d'etre* of a certificate of origin is that it guarantees a minimum local content; if as T agreed, it was a term of the contract that the television sets should be accompanied by Certificate of Singapore Origin, this must necessarily entail that the 45% rule was likewise a term of the contract.

[3] The 45% rule not having been complied with, the seizure of the television sets was reasonably foreseeable to anyone in the business of manufacturing or exporting television sets to the UK and other countries of the EEC.

[4] R having been deprived of the benefit and use of the whole market value of the 7,665 television sets for the period between detention and restoration, it was quite proper for the learned trial Judge to award interest on it in the way he did.

[5] While strong economic conditions in Singapore over the years, including a low rate of inflation, have enabled interest rates to be maintained at a consistently low level, the interest rate in the present case has to be arrived at with reference not to Singapore rates but to the rate at which the respondent could reasonably have borrowed in sterling at the material time. Therefore the 17% interest rate should not be disturbed.

[6] The loss of R was incurred in the United Kingdom, and it would be more appropriate in all the circumstances for the award of damages to be expressed in sterling without any conversion into its Singapore dollar equivalent. This would also avoid the additional problem of having to consider the implications of the great variations in rates of exchange in the intervening period of 5 years.

[Appeal against liability dismissed with costs.]

Cases referred to:
FMC Meat v. Fairfield Cold Stores [1971] 2 Lloyd's Rep 221 ***(cit)***
Miliangos v. George Frank (Textiles) [1975] QB 487 ***(cons)***
Polish S S Co. v. Atlantic Maritime Co., The Garden City [1985] QB 41 ***(cit)***
Tate & Lyle Food and Distribution v. Greater London Council [1982] 1 WLR 149 ***(cit)***

Legislation referred to:
Civil Law Act [Sing], s. 9

For the appellant - Tan Tee Jim
For the respondent - Margaret Neo

JUDGMENT

Yong Pung How CJ:

The appellant is a Singapore subsidiary of Tatung Co. Ltd. of Taiwan (Tatung Taiwan). It set up a factory in Singapore in 1972 and commenced the manufacture of electronic goods in 1975. In 1977 it produced black and white television sets and from June 1977, exported these television sets to the United Kingdom. The respondent is a reputed company incorporated in the United Kingdom, dealing in and distributing electronic goods there.

In 1977 and 1978 there were negotiations between Tatung Taiwan and the respondent for the supply by Tatung Taiwan to the respondent of portable 12" black and white television sets. In 1978 the UK Government introduced quota restrictions on the import of goods from Taiwan into the United Kingdom. The respondent wanted more television sets than Tatung Taiwan could supply under those restrictions so Tatung Taiwan proposed that the appellant as its subsidiary should supply some sets to the respondent as well. The respondent agreed

and subsequently orders were made by way of telephone conversations between Tatung Taiwan and the respondent, and confirmed by way of sales confirmations issued by the appellant. In this Tatung Taiwan acted as the agent of its subsidiary. It was an express term of the eventual agreement that the television sets supplied by the appellant to the respondent should each be issued with a Certificate of Singapore Origin. Pursuant to this agreement the respondent established letters of credit and, between 28 November 1978 and 23 March 1979, the appellant shipped 20,000 television sets to the respondent. The import of television sets into the United Kingdom market is governed by Regulation (EEC) No. 2632/70 of 23 December 1970 on Determining the Origin of Radio and Television Receivers, which came into force in the United Kingdom on 1 January 1971, and which stipulates that radio and television receivers should only be treated as being of Singapore origin if the increase in value they acquire in Singapore represents at least 45% of their ex-works invoice price. This local content requirement will be referred to as the "45% rule".

In 1980, the respondent told the appellant that 7,665 of the television sets sold to it by the appellant had been detained by the UK Customs & Excise because they failed to meet the 45% rule, and had thus been held to have been of Taiwanese and not Singapore origin. According to the UK customs law of the time this meant that the respondent required an import licence to bring the television sets into the United Kingdom, which would not have been the case with television sets of Singapore origin. These television sets were subsequently released upon payment by the respondent of a restoration charge of £95,000 in September 1980. The respondent claimed from the appellant the restoration charges and interest thereon as well as interest on the purchase price of the 7,665 television sets on the ground that their loss of £95,000 was caused by the appellant's breach of a term of the contract of sale that all the television sets should meet the 45% rule. The appellant challenged this claim on the basis that there was no such term in the contract of sale.

The trial Judge found that the appellant had known of Regulation (EEC) No. 2632/70 and that restoration charges imposed on the respondent by the UK Customs and Excise flowed from the appellant's breach of contract. He awarded to the respondent the damages asked for. The appellant has appealed against this judgment.

Although it is not disputed that it was an express term of the contract that the television sets supplied should be issued with a Singapore Certificate of Origin, the appellant contends that there was no further express or implied term that the 45% rule should be complied with. Furthermore it is the appellant's case that it did not even know about the 45% rule until a letter dated 27 February 1979 was sent to it by the Department of Trade, informing it of the EEC rules of origin and asking for a cost analysis of its television sets.

In this case, the contract documents could not have been the whole contract because it is not disputed that a term was included which was not set out in writing, namely, that all the television sets should be issued with a Certificate of Singapore Origin. Therefore it was proper for the learned trial Judge to look at the extrinsic oral and documentary evidence to determine whether there was any other term in any oral agreement between the appellant and the respondent to the effect that the 45% rule would be complied with.

The appellant contends that on the evidence before him, the learned trial Judge ought to have come to the conclusion that the appellant was at all material times not aware of the 45% rule and that it was never a term of the contract, express or implied. The respondent's director, Mr. Pandya, said in evidence that the 45% rule was discussed between the appellant and respondent prior to the issue of the letter of credit. The documentary evidence Mr. Pandya referred to as showing that the appellant knew of the 45% rule was post-February

1979 so that evidence did not prove that the appellant knew of the 45% rule before the orders were placed. The material evidence of this knowledge was his testimony of the oral discussions between himself and the representative of Tatung Taiwan, Mr. Lin. Mr. Pandya said that during the initial stage of negotiations between himself and Mr. Lin, he had on one occasion telephoned Mr. Lin in Taiwan and specifically asked whether the appellant would definitely be able to comply with "the criteria for origin requirement". Mr. Lin had told him that they were fully aware of this. There was an express understanding that certain local components would be used and that facilities for plastic injection moulding were set up in Singapore. The appellant agrees that this was the understanding but says that it was motivated simply by cost-efficiency reasons, not by a conscious wish to comply with the 45% rule. Mr. Lin said in evidence that although Tatung Taiwan exported television sets to the EEC from 1971, no question of the 45% rule had arisen because all the parts were made in Taiwan in accordance with the Certificate of Taiwan Origin, so no one in Tatung Taiwan was really alerted to this rule. Mr. Lin knew that to export television sets to the UK from Singapore the television sets had to have Certificates of Singapore Origin. He said that although he had indeed told Mr. Pandya that this would be seen to, the 45% rule was not also in his mind when he said this. He said that Mr. Pandya never informed him of the rule: it had first been brought to his attention in late February 1979 when a different customer encountered difficulties with the UK Customs and Excise. In this respect, therefore, there was a direct conflict between the appellant's and the respondent's witnesses.

The learned trial Judge considered this conflict. He paid special attention to a statement that Mr. Lin had made during cross examination, that in response to Mr. Pandya's query as to whether the Singapore-made television sets would be issued with Certificates of Singapore Origin, Mr. Lin had replied:

> I told him that Singapore was making picture tubes. I also told him that we were going to send to Singapore some mouldings to make cabinets for (television) sets. Only with picture tube and cabinet the content might not be 45%.

The learned trial Judge concluded that Mr. Pandya and Mr. Lin had in fact discussed the 45% rule at the material time. The appellant contends that he was wrong to so conclude but has not specifically identified what is unreasonable about this conclusion. On the evidence as it appears before this Court, there is nothing to indicate that the learned trial Judge made an error of fact or law in his decision on this point. Since the 45% rule would have been a material factor in any agreement concerned with the import of television sets into the United Kingdom, and Mr. Lin's knowledge of it was derived from the transactions he negotiated in behalf of the appellant, the appellant must be deemed to be affected with the knowledge of Mr. Lin on this point because it was a possible term which Mr. Lin had power to bind the appellant on or at least had a duty to inform the appellant about, and so the respondent should be permitted to assume that Mr. Lin's knowledge was passed on.

In addition the respondent argued successfully in the Court below that before the Certificates of Singapore Origin could properly be issued the television sets would have had to comply with the 45% rule and compliance with that rule must have been a term of the contract; the relevant EEC regulation was in force in the United Kingdom from 1 January 1971, so in the 7 years which had elapsed since then, 7 years during which the appellant had been in the business of exporting television sets, it was more likely than not that the appellant knew of the 45% rule at the material time. The whole purpose of the requirement in the contracts for Certificates of Singapore Origin was to ensure compliance with the 45% rule and the appellant knew this.

The appellant contended that its main export business was with the USA during those 7 years. The fact that it did export goods to the EEC was also not specifically indicative of knowledge, because it only exported goods to the EEC from April 1977, there were only a few shipments before the relevant incident, and whether or not the goods in fact fell below the 45% mark, they were not detained or questioned and the requirement therefore was not brought to the appellant's notice. The appellant's deputy general manager at the relevant time, Mr. Daily, testified at the trial that he believed the Singapore Government was not concerned with percentages of local content until 1979 and that was why the appellant's products qualified for Certificates of Singapore Origin until then. He said that they did not have to show that the 45% rule was complied with before they could get a Certificate of Singapore Origin. The appellant's position prior to 1979 was that they could assemble in Singapore parts manufactured all over the world and still properly export the finished products as Singapore made.

We find it difficult to accept that the appellant, with its long experience in the business of exporting electronic goods, did not know about the 45% rule at the material time. In any case, the *raison d'etre* of a certificate of origin is that it guarantees a minimum local content; if, as the appellant agreed, it was a term of the contract that the television sets should be accompanied by Certificates of Singapore Origin, this must necessarily entail that the 45% rule was likewise a term of the contracts. Accordingly, the appeal against liability is dismissed with costs.

The appellant has also included an appeal against the award of damages imposed by the learned trial Judge. Specifically the appellant contends that the learned trial Judge ought to have held that the respondent's claim for restoration charges imposed by the UK customs authorities was too remote, in the sense that in this case the chain of causation was broken. The restoration charge was incurred as a result of the respondent's lack of an import licence and not by non-compliance by the appellant with the 45% rule. Further, the appellant contends that the interest chargeable on any award ought to have been upon the difference between the market value of the goods at the time and place fixed by the contract for delivery and the market value of the goods at the time and place when the goods were actually delivered; the respondent ought not to be entitled to interest on the purchase price. Finally, the appellant contends that the rate of interest awarded, 17%, was not the proper rate to apply.

As to the first point, the respondent's need (and consequent lack) of an import licence only arose as an inevitable result of the appellant's non-compliance with the 45% rule. If the rule had been complied with by the appellant, the goods would have been held to be of Singapore origin and the question of an import licence would never have arisen. We are in agreement with the learned trial Judge's finding that, the 45% rule not having been complied with, the seizure of the television sets was in the circumstances of the case reasonably foreseeable to anyone in the business of manufacturing or exporting television sets to the United Kingdom and other countries of the EEC. In fact, what happened in this case was that the respondent mitigated the loss by negotiating with the UK customs authorities and paying the £95,000 restoration charge, so as to get back the 7,665 television sets to resell them again; and, if the respondent had not done so, the loss for which it would have claimed against the appellant would have been much greater. The law is clear: where, as a result of a defendant's breach of contract, a plaintiff takes steps to mitigate and incurs reasonable expenses, the plaintiff may recover damages to indemnify him in respect of these expenses. The mere fact that the defendant was unaware of the specific nature of the expense incurred would not affect his liability to indemnify the plaintiff.

As to the second point, we are unable to see the relevance of the appellant's argument. The contract was FOB Rotterdam, the goods were delivered on board on time, and there was no question of delay in delivery with a resulting change in the market value of the goods. In calculating its loss, the respondent took into account freight charges and duty paid, so as to include all the ancillary expenses incurred, and this calculation was not subjected to cross-examination at the trial. In the circumstances, the respondent having been deprived of the benefit and use of the whole market value of the 7,665 television sets for the period between detention and restoration, it was quite proper for the learned trial Judge to award interest on it in the way he did. He had noted that the appellant "did not question the arithmetical calculations relating to the three heads of damages".

A Court in Singapore has power to order interest at such rate as it thinks fit for the period up to the date of judgment on the damages that it awards: Civil Law Act, s. 9. In the present case, a 17% rate of interest was used by the respondent in making up its claim. The record does not show that any serious challenge was made by the appellant to this rate in the Court below, and the rate was applied by the learned trial Judge. Before this Court, appellant's Counsel has referred to the long-standing practice of the Commercial Court in London to award a rate of interest which reflects the current commercial value of money. The Court has been taken by him through the progressive developments in London of applying an interest rate of one per cent over the current banking norm, whether it was over the bank rate (*FMC Meat v. Fairfield Cold Stores* [1971] 2 Lloyd's Rep. 221); or over the minimum lending rate (*Miliangos v. George Frank (Textiles)* [1975] QB 487); or over base rate (*Polish S S Co. v. Atlantic Maritime Co., The Garden City* [1985] QB 41). Respondent's Counsel has submitted that the proper course for a Court to follow would be to apply the rate at which the actual plaintiff in a case, provided he did not have any special or peculiar attribute, could borrow in the market (see *Tate & Lyle Food and Distribution v. Greater London Council* [1982] 1 WLR 149); and in the present case, she has submitted that in fact Mr. Pandya gave evidence that at the material time 17% interest was the rate the UK banks were charging on sterling loans. Mr. Pandya was not asked to prove this nor was he cross-examined on it. While strong economic conditions in Singapore over the years, including a low rate of inflation, have enabled interest rates to be maintained at a consistently low level, we are of the view that the interest rate in the present case has to be arrived at with reference not to Singapore rates but to the rate at which the respondent could reasonably have borrowed in sterling at the material time. In our view therefore the 17% interest rate should not be disturbed.

In response to the form in which the claim was filed, the damages awarded to the respondent in the Court below were expressed in Singapore currency, after converting them at the exchange rate prevailing at a certain date. As in the United Kingdom (see *Miliangos v. George Frank (Textiles), supra*), a Singapore Court in an appropriate case may make its award of damages in a foreign currency. In the present case, the loss to the respondent was incurred in the United Kingdom, and, in our view, it would be more appropriate in all the circumstances for the award of damages to be expressed in sterling without any conversion into its Singapore dollar equivalent. This would also avoid the additional problem in a case which has unfortunately taken so many years to reach this point, of having possibly to consider the implications of the great variations in rates of exchange in the intervening period. The order in the Court below dated 1 November 1988 will be varied accordingly.

Also found at [1991] 3 CLJ 2339